Rights Organizations' proposals jointly with the anti-minority proposals favorably recommended for comment by the Commission.

Fourth, even had there been no Comparative Hearing Policies NPRM, it would be high time to assign an "RM" number to the Civil Rights Organizations' proposals. They have been on the shelf for nearly two years without even being stamped in with an "RM" number by the Secretary -- a ministerial act which, if not performed, essentially pocket vetoes the proposals. The APA requires the Commission to allow citizens to file petitions for rulemaking. 5 U.S.C. §553(e). The Commission's own rules require the Commission to assign petitions for rulemaking "RM" numbers. 47 CFR §1.403 ("[a]ll petitions for rule making...meeting the requirements of §1.401 will be given a file number, and promptly thereafter, a 'Public Notice' will be given (by means of a Commission release entitled 'Petition for Rule Making Filed' as to the petition, file number, nature of the proposal, and date of filing.") While the Commission may have some discretion on when to assign an "RM" number, that discretion is not without limits and cannot be exercised arbitrarily or so as to discriminate against disfavored classes of petitioners. The Commission may not circumvent Section 1.403, which requires it to "promptly" put out a public notice after assigning an "RM" number, by simply failing or delaying interminably the ministerial act of assignment of an "RM" number in the first instance. It should not take two years for any party, even including major national organizations, to have their proposals stamped in by the Secretary. Failing to stamp in the Civil Rights Organizations' proposals with an "RM" number serves no legitimate governmental interest.

The Commission's treatment of minority-filed rulemaking petitions is squarely at odds with the Commission's treatment of petitions for rulemaking by nonminorities, which commonly receive "RM" numbers almost immediately.7/

The Civil Rights Organizations are entitled to rely on the Commission's customary practices. Cf. St. Croix Wireless Co., 3 FCC Rcd 4073 ¶7 (1988), recon. denied, 5 FCC Rcd 4564 (1990). The Commission's custom is to provide RM numbers routinely in about two months.8/ Thus, in processing rulemaking petitions -- except those filed by minority groups -- the Commission's custom is to act "with all deliberate speed." Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II"). The Commission's studied ignorance of minority organizations' rulemaking proposals continues a pattern of deliberate, nonbenign neglect of rulemaking proposals submitted in

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7/ Compare, eg., Review of the Commission's Regulations and Policies Arffecting Investment in the Broadcast Industry (NPRM and NOI), FCC 92-96 (released April 1, 1992) at 7 ¶13 and 9 ¶18 (calling for comment on four declaratory ruling requests by nonminority interests). An example of the Commission's speed in handling rulemaking rqeuests by nonminorities is its March 22, 1992 assignment of RM-7932 and RM-7933 to the NAB's "FM Freeze" petitions, the effect of which would be to terminate FM comparative hearings (and, with them, new minority ownership except through purchases from incumbents). The NAB's petitions for rulemaking were filed February 10, 1992 and put out for comment just five weeks later.

8/ During the period May 1, 1990 - April 30, 1991, a period which includes the September, 1990 dates of submission of the Civil Rights Organizations' rulemaking proposals discussed herein, 42 petitions for rulemaking (excluding those seeking to amend the TV and FM Tables of Allotments) were filed and given "RM" numbers. The mean time between filing and assignment of an "RM" number was 76 days; the median time was 45 days, and in no case was it more than 327 days. This demonstrates that the Commission's custom is to assign "RM" numbers almost immediately. The Civil Rights Organizations do not know why this otherwise universal practice seems to apply to everyone but minority groups.

good faith by numerous minority groups over the past two decades.9/

9/ The Commission's treatment of rulemaking proposals filed by the civil rights community is presented below without comment.

(1) It took the Commission nearly three years to rule on NBMC's November 11, 1973 Petition for Rulemaking, denying or deferring action on all 61 of NBMC's proposals. The delay which prompted a partial dissent by Commissioner Hooks. NBMC, 61 FCC2d 1112 (1976). While nine of NBMC's proposals were to be referred to various Commission staff offices, nobody followed through, and to this day, no further proceedings have commenced.

(2) NBMC's 1979 Petition for Rulemaking, with 35 proposals, was denied in its entirety after a 1 1/2 year delay. Advancement of Black Americans in Mass Communications, 49 RR2d 442 (1981).

(3) A decade after it was filed, NBMC's November 20, 1981 Petition for Rulemaking on Minority Ownership still lacks a "RM" number, even after NBMC asked for one at a 1984 en banc meeting of the Commission on the subject of minority ownership. The only result of that en banc meeting is that it was the last time the Commission met en banc to hear the views of minority groups.

(4) NABOB's November, 1981 Petition for Rulemaking on Minority Ownership, seeking liberalization of the distress sale policy to permit sales to minorities for much lower than 75% of fair market value after commencement of a hearing, was dismissed in 1988 solely because of the staleness of the record.

(5) The NAACP's Petition for Rulemaking on the role of drug dealers who use children with FCC-authorized beepers as runners in the drug trade should have been noncontroversial. It was lost by the staff until the Secretary personally found it and gave it an "RM" number (RM-6619). Thereafter, it has sat on the shelf for over four years. The Commission knows it's there, having all but denied it. See Amendment of Part 1 of the Commission's Rules to Implement Section 5301 of the Anti-Drug Abuse Act of 1988 (Report and Order), 6 FCC Rcd 7551, 7556 n. 15 (1991). Today, children under 18 continue to use FCC-regulated beepers in the drug trade without their parents' permission.

(6) Eight other substantive proposals designed to benefit minority ownership, all filed in September, 1990, also yet await the ministerial act of assignment of an "RM" number. See New Rules and Policies Designed to Foster Minority Ownership of Communications Facilities (Petition for Rulemaking of the NAACP, LULAC, NHMC and NBMC, filed September 18, 1990, no file number). The Civil Rights Organizations still await their "RM" numbers, even after having visited personally with each Commissioner, the General Counsel, the Chief of the Mass Media Bureau, and several support staff in early 1991 seeking designation of "RM" numbers. Nobody can say that the Civil Rights Organizations haven't tried faithfully to work through the system.

Fifth, consideration of the anti-minority Rochlis proposal -- especially if undertaken without parallel consideration of pro-minority initiatives such as those recommended by the Civil Rights Organizations -- would so seriously dilute the minority preference as to fall well afoul of Pub. L. 102-140.10/ Consideration of the Rochlis proposal together with the Civil Rights organizations' proposals might reflect the "balanced" approach approved by the Second Circuit in NBMC v. FCC, supra, 63 RR2d at 5 (approving the daytimer preference because it "balances" the minority preference). The Commission may not proceed further with a rulemaking proceeding which so plainly violates the intent of Congress.11/

10/ One Commissioner has recognized that the instant docket asks "questions that could dilute the diversification criteria; thus, potentially impacting new entrants, including minorities and women, more negatively." Statement of Commissioner Andrew Barrett, Dissenting in Part and Concurring in Part, in MM Docket No. 91-140, FCC 92-98 (released April 10, 1992) at 8.

11/ The Commission could not rationally dilute the minority preference even had Congress not acted to prevent such dilution. In light of the gross underrepresentation of minorities in broadcast station ownership and the NTIA's study showing a sharp decline in minority ownership even as the total number of stations increases (see n. 6 supra), the Commission could not contend that the need for minority ownership "has become less urgent" since its policies were belatedly initiated. See Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 544 (2d Cir. 1977) (reversing Commission attempt to remove meaningful EEO regulation from 2/3 of broadcast licensees).

RELIEF REQUESTED

In light of the harm done by the Commission's erroneous omission of the Civil Rights Organizations' proposals, the Commission should promptly issue a supplemental notice of proposed rulemaking seeking comment on the proposals, and emphasizing that the proposals are to be given the same consideration as are any other proposals.

Someone might suggest that the Civil Rights Organizations may simply refile their proposals -- for the third time -- as Comments on the Comparative Hearing Policies NPRM. That procedure is insufficient, as it will give Mr. Rochlis, a party in exactly the same procedural posture as the Civil Rights Organizations, considerably more procedural due process than the Civil Rights Organizations will have received.

There are two reasons why the opportunity to refile their proposals is insufficient relief for the Civil Rights Organizations.

First, Mr. Rochlis has already reaped the benefit of being assigned an "RM" number, generating a round of comments and reply comments. He received that relief almost immediately after filing his proposals -- which ironically were filed as comments on the same Reconsideration/Rulemaking Petition by the Civil Rights Organizations which was not included in RM-7740 nor given its own "RM" number. The Civil Rights Organizations have waited nearly two years for the same opportunity for a full public airing of their proposals as Mr. Rochlis enjoys for his proposal.

Second, by having his "RM" number included for comment in the caption of the Comparative Hearing Policies NPRM, Mr. Rochlis will be graced with a wealth of substantive comments (including a comment from the Civil Rights Organizations, opposing his proposal on the grounds that it will operate as a preference system for Whites and will almost always have the effect of eliminating any comparative benefit attendant to the minority preference). Mr. Rochlis will then have an opportunity to research the merits of his opponents' contentions, possibly reformulate his proposal to avoid their objections, and -- above all -- have the last word. The Civil Rights Organizations will have no such opportunities; their detractors will have the last word. Indeed, Mr. Rochlis would get two bites of the rebuttal apple: first in response to the public notice putting out his proposals as an "RM", and second, in reply comments in this proceeding. The right of rebuttal, written into 47 CFR §1.415(c), is fundamental to the development of a full record in a rulemaking proceeding. It is not to be discarded lightly. Absent the relief sought by this Motion, Mr. Rochlis will have that the last word on his proposals -- a privilege denied to the Civil Rights Organizations and their proposals.

Someone might also point out that the Commission has just established a Small Business Advisory Committee (after a two year delay), which might provide a forum for the Civil Rights Organizations to expound on their proposals. While laudable, the Advisory Committee will not be empowered to make rules. The rulemaking process makes rules; advisory committees give advice and issue reports. Rulemaking is "the real thing." It would be patronizing, and indeed smack of segregated governance, for an

advisory committee to become a separate but unequal "minority channel" for input into major decisions.

The Commission may ultimately prefer Mr. Rochlis' substantive proposals as a result of a rulemaking proceeding in which his proposals are the subject of notice and comment. It may not, however, stack the procedural deck to favor Mr. Rochlis' proposal over the Civil Rights Organizations' proposals. See Empire State Broadcasting Corporation (WWKB), 6 FCC Rcd 418 (1991) (procedural due process under Ashbacker requires the Commission to consider mutually exclusive proposals jointly even where the outcome is essentially predetermined). Even if the Commission ultimately selects Mr. Rochlis' anti-minority approach and rejects the Civil Rights Organizations' proposals, it may not reach that result by affording greater procedural opportunities to Mr. Rochlis to develop his case than it affords to others in exactly the same procedural shoes.12/

By ignoring ¶33 of its own Comparative Hearing Procedures MO&O, promising to treat the Rochlis and Civil Rights Organizations' submissions as rulemaking petitions, the Commission

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12/ The Civil Rights Organizations represent nearly 750,000 consumers of broadcast programming, and speak generally for a much larger constituency. Mr. Rochlis represents only himself and his private economic interest, which can be furthered only at the expense of minorities. Nonetheless, the Civil Rights Organizations do not seek more procedural relief than was afforded to Mr. Rochlis -- only equal treatment with him. Nor does this limited Motion request the Commission's endorsement of the Civil Rights Organizations proposals. It requests only that the proposals be treated with procedural regularity.

violated the strict requirement that it treat similarly situated parties equally. It treated Mr. Rochlis "more equally" that it treated the Civil Rights Organizations. See Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (Commission exhibited a "curious neutrality in favor of the licensee.") Moreover, it has allowed the Civil Rights Organizations' proposals to languish for nearly two years without even being stamped in with a "RM" number. No legitimate interest has been served by the Commission's avoidance of genuine citizen input into its processes. Its treatment of the Civil Rights Organizations' proposals is legally, intellectually and morally indefensible.

CONCLUSION

To insure that the Civil Rights Organizations -- who have been quite patient[13/] in waiting for their "RM" numbers -- are given the same procedural due process as was afforded Mr. Rochlis, the Commission should promptly assign the Civil Rights Organizations' proposals an "RM" number or incorporate the Civil Rights Organizations' proposals into RM-7740 as was contemplated in ¶33 of the Comparative Hearing Procedures MO&O; recaption the Comparative Hearing Policies NPRM according, and issue a supplemental notice amending the Comparative Hearing Policies NPRM

13/ The Commission should applaud, the considerable patience of the Civil Rights Organizations in working within the system to achieve their legitimate objectives in the face of the this record of procedural relief denied, pocket-vetoed and delayed. It is only because the disparity in procedural handling of Mr. Rochlis' anti-minority proposal and the Civil Rights Organizations' pro-minority proposals is so palpable that the Civil Rights Organizations have regrettably had to resort to filing this Motion and the Time-Sensitive Motion for Stay which accompanies it.

and specifically calling for comment on the Civil Rights Organizations' proposals.14/

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May 1, 1992

14/ The Civil Rights Organizations regret that this Motion is being filed two weeks into the six week comment cycle. They would have filed it immediately after issuance of the Comparative Hearing Policies NPRM but for the fact that its preparation was interrupted by an apparent heart attack of lead counsel.

EXHIBIT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Proposals to Reform the	)	MM Docket No. 90-264
Commission's Comparative	)	RM - ____
Hearing Process to Expedite	)	
the Resolution of Cases	)	

TO THE COMMISSION

PETITION FOR RECONSIDERATION, OR IN THE ALTERNATIVE PETITION FOR RULEMAKING OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND THE NATIONAL BLACK MEDIA COALITION

The National Association for the Advancement of Colored People, the League of United Latin American Citizens and the National Black Media Coalition ("Civil Rights Organizations") respectfully submit this Petition for Reconsideration of the Commission's Report and Order, FCC 90-410 (released December 21, 1990) ("R&O") in the above referenced proceeding. In the alternative, they request that if the Commission declines to reconsider its R&O as discussed below, it treat this filing as a Petition for Rulemaking and assign it an "RM" number pursuant to 47 CFR §1.403 ("all petitions for rulemaking...will be given a file number, and promptly thereafter, a 'Public Notice' will be given").1/

1/ On September 18, 1990, the Petitioners herein filed a Petition for Rulemaking containing numerous procedural and substantive proposals to advance minority ownership in broadcasting and other media. The Petition sought, inter alia, expansion of the tax certificate and distress sale policies, revision of the multiple ownership rules where the effect would be to enhance minority ownership, enhancing the renewal expectancy for investors in minority owned broadcast facilities, and extending the minority vending requirements applicable through the Cable Act to broadcasting.

(fn. continued on p. 2)

> [W]e invite public comment on the proposals set out above. Those proposals are firmly rooted in our commitment to resolve comparative broadcast hearings by Commission decision in just over one year from their designation, and we ask commenters to keep that goal in mind. We will also entertain other proposals designed to achieve the same end.

NPRM at 4055 ¶45.

Thus, the scope of the NPRM was extremely broad, surely inviting a wide range of suggestions relating to all aspects of comparative hearings.[2/] The substantive questions of the comparative qualifications of applicants and whether to relieve settling applicants of integration commitments were expressly addressed in the NPRM.[3/] The NPRM's openness in soliciting creative and robust comment on all aspects of this matter was consistent with the concept that a rulemaking proceeding is more akin to a democratic town meeting, seeking consensus, than a Marxist plebicite, seeking only a "Yes" or "No" vote on preselected alternatives with no new ideas permitted.

2/ It can be argued that the Civil Rights Organizations' proposals are aimed at increasing the equity, as opposed to the expedition, of comparative hearing decisions. Yet equity and expedition should go hand in hand. Agency speed without agency justice merely results in airwaves more rapidly saturated with cacaphony rather than deliberately developed with diversity among licensees. Justice without equity is a nonsequitur, for few minorities can afford lengthy proceedings. Moreover, unjust results necessarily leave in their wake disgruntled, unsatisfied applicants who will more readily pursue their appellate rights. Substantive unfairness only undercuts the Commission's desire for expedition. Equity, using the words of the NPRM at 4055 ¶45, is very much "designed to achieve the same end" as expedition.

3/ See discussions of the Anax policy NPRM at 4053 ¶¶21-23) and the Ruarch policy (NPRM at 4052 ¶15).

Believing that their creative input would be welcomed, the Civil Rights Organizations filed Comments on September 14, 1990. Those Comments are appended hereto and incorporated by reference herein.

The Comments contained four major proposals.[4/]

First, the Civil Rights Organizations proposed that to facilitate the financing of minority applicants, noncontrolling interests of SBA-qualified MESBICs not be attributed for integration purposes. Comments at 9-10.

Second, the Civil Rights Organizations proposed the expansion and revision of the broadcast experience credit to encompass nonbroadcast managerial experience transferable to broadcasting. This proposal was intended to attract more qualified minority entrepreneurs to broadcasting and avoid penalizing minority applicants for the effects of discrimination in broadcast employment. Comments at 10-13.

4/ The Comments also addressed themselves to the Anax policy, urging that it be retained with greater post-grant enforcement of integration and insulation promises by two-tier applicants. Comments at 5-9. The R&O grants the essence of the relief sought in the Civil Rights Organizations' Comments relating to the Anax policy.

Third, the Civil Rights Organizations proposed a revision of the minority sensitivity credit such that it could be applicable to any proceeding and not be available only for the purpose of offsetting another applicant's minority ownership credit, and to require a showing of actual past activities as opposed to mere promises of future minority-related activities by applicants seeking this credit. This proposal was intended to encourage the licensing of minority sensitive applicants regardless of who their hearing competitors might be. Comments at 13-14.

Fourth, the Civil Rights Organizations proposed the award of a comparative heaing preference for applicants divesting an FM or VHF TV station to minorities for no more than 75% of fair market value within one year after earning a permit. This proposal was intended as an incentive for the sale of stations to minorities. Comments at 15-16.

Because these Comments proposed alternative courses of action which were plainly within the scope of the NPRM, the Commission was required to rule on them. See NCCB v. FCC, 567 F.2d 1095 (D.C. Cir. 1977).

5/ As noted at 3 supra, this proceeding covered both procedural and substantive (Anax; Ruarch) matters. Thus, the assertion that the proceeding dealt "for the most part" with procedural matters is incorrect and an insufficient and arbitrary basis to decline to rule on proposals, like the Anax policy, which are designed to inject a dose of substantive racial justice into the Commission's seminal function of broadcast licensing.

However, the R&O's entire ruling on the Civil Rights Organizations' proposals was its holding that the proposals "were not raised in the Notice, and they are beyond the scope of this proceeding which focuses, for the most part, on the procedures employed in broadcast comparative cases rather than the comparative criteria used to evaluate the applicants." R&O at 26 ¶52.[5/] The R&O did not even explain why the proposals were beyond the scope of the proceeding. Nor did the R&O take the simple, alternative step of treating the proposals as a petition for rulemaking and requesting comment on them, as Commissioner Quello apparently would have preferred.[6/]

The R&O's ruling is arbitrary, capricious and an abuse of discretion. The Civil Rights Organizations' proposals were well within the scope of this proceeding. They merited at least the courtesy of a ruling.

For the foregoing reasons, the Civil Rights Organizations respectfully request the Commission to reconsider its prior refusal to address these proposals, and to either grant them on reconsideration, or assign them an "RM" number, or issue them as part of a new rulemaking proceeding aimed at increasing minority participation in the broadcasting industry.

6/ See Separate Statement of Commissioner James H. Quello, urging that the Commission "should initiate a new rulemaking proceeding to reexamine some of our policies for evaluating competing applications. Some of the proposals submitted in this proceeding might provide a good point of departure for such an analysis."

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January 22, 1991

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Proposals to Reform the	)	MM Docket No. 90-264
Commission's Comparative	)	
Hearing Process to Expedite	)	
the Resolution of Cases	)	

TO THE COMMISSION

COMMENTS OF THE
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
THE NATIONAL HISPANIC MEDIA COALITION,
AND THE NATIONAL BLACK MEDIA COALITION

The National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition, and the National Black Media Coalition ("Civil Rights Organizations") respectfully submit their Comments on the Notice of Proposed Rulemaking, 5 FCC Rcd 4050 (1990) ("NPRM") in the above referenced proceeding.

INTEREST OF ORGANIZATIONS

The National Association for the Advancement of Colored People ("NAACP"), founded in 1909, is the oldest and (with 500,000 members) the largest civil rights organization in the United States. The basic aims of the NAACP are to advance minority participation in all aspects of society and to destroy all limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The League of United Latin American Citizens ("LULAC") is a sixty-year old national membership organization concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively promoted minority employment and ownership policies in the broadcast media before the FCC and the courts.

The National Hispanic Media Coalition ("NHMC"), founded in 1986, represents more than two dozen organizations striving to improve the image of and employment of Hispanics in the media. It regularly participates in FCC matters as an advocate for stronger policies favoring minority ownership and employment.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing on minority employment and ownership in the broadcast media. Since its founding in 1973, NBMC has participated in dozens of adjudicatory and rulemaking proceedings to vindicate and expand the FCC's minority ownership policies.

BACKGROUND

When the history of broadcasting in the 20th Century is written, it will be characterized as the period dominated by the division of the spectrum among willing and eager claimants. Once the spectrum is gone, the policy choices made in selecting the chosen occupants will haunt us for decades and be literally impossible to reverse.

We are at the twilight of the great spectrum rush which began in the 1920s and which will conclude by the turn of the century. Docket 80-90 is over. Consequently, this proceeding will govern the apportionment of the last of the most valuable FM facilities.

Essentially all of the most valuable television and AM facilities are long since licensed. Thus, unless minorities receive a preference for the expanded AM band[1/] or for a proposed new digital audio service,[2/] there will be few remaining opportunities to increase minority ownership through the comparative hearing process.

1/ On October 15, the Civil Rights Organizations expect to file their Comments in MM Docket No. 87-267, supporting eligibility criteria favoring minorities as owners in the expanded AM band. Regrettably, this was not the approach favored in the Commission's Notice of Proposed Rulemaking. See AM Technical Rules, 5 FCC Rcd 4381, 4396 (1990) (Separate Statement of Commissioner Andrew C. Barrett).

2/ On October 12, the Civil Rights Organizations expect to file their Comments in response to the Notice of Inquiry in GEN Docket No. 90-357, FCC 90-281 (released August 21, 1990). Therein they will propose a procedure fostering minority ownership and entrepreneurship in the development of the new service.

At stake in this spectrum rush are the social, political and cultural diversity of the country. These are intangibles which the Commission has long chosen to allocate primarily through its ownership rules rather than through direct program regulation. See Deregulation of Radio, 84 FCC2d 968 (1981) (subsequent history omitted).

At this point in the history of broadcasting, equity must be the primary objective. Every American enjoys at least one broadcast service. Most communities receive service from many services, and nearly all communities of substantial size boast a number of competing local services. Thus, the principal objectives of the Commission in implementing Section 307(b) of the Act have been achieved. See Clear Channel AM Broadcasting, 78 FCC2d 1345, 1349 (1980) (subsequent history omitted).

Robust minority participation in ownership is the last remaining task facing the Commission in shaping the spectrum to foster diversity. We lack ownership diversification to match the melting pot. The nation's population has melted into the pot while media ownership is largely frozen. The facade presented by the media industry is overwhelmingly a white one, calcified and forbidding to the small, new entrant, whose last hope for a piece of the spectrum pie is at stake in this rulemaking proceeding.

The task of parcelling out the last crumbs of the spectrum is a delicate one. It should be accomplished giving first priority to equity and second priority to expedition. Short-sighted procedures sacrificing equity and due process to gain a few months advantage in the initiation of new service would disserve the public.

These comments will focus on how the Commission's comparative hearing process can be improved to foster more minority ownership. Often, this goal will be congruent with some of the goals underlying this rulemaking proceeding -- ie. reducing the cost of hearings for the litigants. Money savings to litigants reduce the price of entry, thus increasing the number of less well heeled applicants, especially legitimate minority applicants. Yet where there is a choice between equity and expedition, equity must have the upper hand.

PROPOSALS OF THE CIVIL RIGHTS ORGANIZATIONS

I. MODIFICATIONS TO THE ANAX POLICY

If it abolishes the Anax policy (articulated in Anax Broadcasting, Inc, 87 FCC2d 483, 488 (1981) and extended in Minority Ownership in Broadcasting, 92 FCC2d 849 (1982)) ("1982 Policy Statement") the Commission would be making a serious mistake.

After thorough deliberations by its Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, the Commission extended Anax to its tax certificate and distress sale policies,

> explicitly recognizing the "significant minority involvement" which exists by virtue of a minority general partner's ownership interest and complete control over a station's affairs. Moreover, we are increasing minority opportunities by enabling minority entrepreneurs to capitalize their broadcasting ventures by attracting and utilizing the investments of others to a greater extent.

Id. at 855 (fn. omitted).

The Commission opted for a case by case approach to avoid sham arrangements, promising to "continue to review such agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)."[1/] Id.

The elimination of Anax will reverse many of the minority ownership gains of the past decade. The Commission need only examine the pre-Anax regulatory regime to appreciate what the repeal of Anax will bring. Before Anax, minorities seldom won comparative hearings. Without the assistance of interested investors, many minorities simply lacked the resources to file applications without passive investors.

Now is hardly the time for the Commission to reduce opportunities for minority ownership. There is no less of a need for expanded minority ownership now than there was in 1981. See Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) (Commission "does not argue, nor could it, that the need for equal employment opportunity has become less urgent" since EEO enforcement began in 1969.)

The Civil Rights Organizations sympathize with the Commission's desire to eliminate abuse of its processes. Yet far from eliminating abuse, repeal of Anax will only make abuse even harder to root out.

1/ The NPRM is not proposing elimination of the extension of Anax to distress sales and tax certificates. The Civil Rights Organizations trust that such an extension would be beyond the scope of this proceeding; surely it would be highly disruptive of minority broadcast financing. But see NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987).

Without Anax, an investor wishing to front off a local resident or a minority to win a broadcast permit need only provide the applicant's financing in a form which later permits the investor to own or control the station. He can do this openly (through a penalty clause for using other financing, plus nonvoting warrants) or the way many do it now -- through a handshake. He can then lend most of the money for prosecution expenses, and simply call the note in full immediately if the applicant wins.

The existence of such an arrangement would be almost discovery-proof. By hiding behind a purported sole proprietor, an unscrupulous investor would never be rooted out. At least limited partnerships or two tiered corporations are conducive to scrutiny through discovery. Thus, most sham arrangements are in fact rooted out through the hearing process.

Abolition of Anax would deter some abuse, but would have the effect of denying entry to the many genuine minority controlled applicants who cannot afford to obtain control any other way.[2/]

The Commission should modify rather than abolish Anax. If the wrong to be remedied is abuse of process, the Commission should deal directly with that problem. It can do this by taking steps to help assure that voting owners maintain actual control. These steps should include:

2/ Recent examples include Mableton Broadcasting Co., Inc., 5 FCC Rcd 2474 (ALJ Walter Miller, 1990) (three of seven two-tier applicants found to be valid); Willie A. Jefferson, 5 FCC Rcd 2601 (ALJ Edward Luton, 1990) (all three two-tier applicants found to be valid). In both cases, two-tier applicants controlled by Black female local residents were awarded the permit. These cases illustrate that abuse is already being successfully rooted out, and that abuse is not always present.

(1) Requiring two-tier permittees who won their construction permits in comparative hearings to certify, in their applications for licenses to cover the permits, and in each subsequent ownership report for the succeeding three years, that the voting owners have maintained both voting and operating control, presently are in control, and will continue to maintain control. The license to cover is the appropriate occasion on which to obtain this information, since its purpose is to verify that all conditions of the construction permit have been met.

(2) Require two-tier permittees, in their applications for licenses to cover, to show the basis upon which the construction of the station was financed, and the basis upon which initial operations will be financed. Copies of any agreements between the voting owners and the non-voting owners, as well as any documents involving the station to which the non-voting owners are a party, should also be provided with the license to cover application.

(3) The Field Operations Bureau staff should randomly check two-tier licensees who secured their original permits in comparative hearings to insure that the voting owners are in fact maintaining control. See 47 CFR §0.111(a) (delegation of authority to FOB).

(4) The voting parties in two-tier applicants for radio permits should be expected to have and retain at least a 20% interest in the applicant. See NPRM, 5 FCC Rcd at 4053; 1982 Policy Statement, supra, 92 FCC2d at 855 n. 28 (20% equity ownership is appropriate, "reflecting the realities of the financial and business world.")

If the Commission rejects this approach and abolishes Anax, it should do so only prospectively. Many valid and worthwhile applicants relied in good faith on Anax in forming their companies and partnerships. See Las Americas Communications, Inc., 5 FCC Rcd 1634, 1636 (1990) (prospective rulemakings are preferred for due process purposes); cf. Bowen v. Georgetown University Hospital, 488 U.S. 204, 217 (1988) (APA definition of rule having "future effect" must mean "that rules have legal consequences only for the future") (Scalia, J., concurring). Two-tier applicants who applied and invested money in good faith under present policies should not have their legitimate expectations dashed without warning.

2. NONATTRIBUTION OF MESBIC INTERESTS

The Civil Rights Organizations propose that noncontrolling interests of qualifying MESBICS in broadcast applicants, whether present interests or future interests such as voting warrants, not be attributed in comparative hearing proceedings.

The Civil Rights Organizations make this proposal because the effect of the Commission's treatment of warrant interests effectively precludes most minority applicants from using MESBIC financing. Some MESBICs cannot provide financing to most new entrants without reserving to themselves a voting warrant interest. The Commission attributes these interests as though they are a present, nonintegrated, voting interest.